NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1262

CORNELIUS K. HURLEY, JR.,[1] & another[2]

vs.

SUZANNE H. KEOHANE, trustee,[3] & others.[4]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The parties are family members who own four contiguous lots near Old Silver Beach in Falmouth. The two plaintiffs each own, respectively, one of the lots, and a single-family dwelling exists on each of those lots (lots 20 and 21). The defendant Keohanes own the other two lots (lots 32 and 250), one of which is improved by a single-family dwelling (lot 32). No dwelling exists on the Keohanes' second lot (lot 250).[5] The plaintiffs and defendant Patricia H. Keohane are siblings (collectively, the siblings), being children of Mildred G. Hurley and C. Keefe

[1] Individually and as trustee of the C.K.H. Realty Trust.
[2] Sheila H. Canty, as trustee of the Canty Family Realty Trust.
[3] Of the Harold J. Keohane Irrevocable Income Only Trust I.
[4] Harold J. Keohane, individually and as trustee of the Keohane Santuit Realty Trust; Patricia H. Keohane; and the zoning board of appeals of Falmouth.
[5] Lot 21 benefits from a driveway easement over and across lot 250.

Hurley, Sr. (the parents), who at one time owned all four lots. This action began when the Keohanes asked the Falmouth building commissioner to confirm that lot 250 was buildable, despite the lot's noncompliance with the minimum lot size requirement found in Falmouth's zoning bylaw (bylaw). After the building commissioner denied the Keohanes' request, the Keohanes appealed to the zoning board of appeals of Falmouth (ZBA). The ZBA determined that lot 250 was buildable, overturning the building commissioner's decision. The plaintiffs then challenged the ZBA's decision in the Land Court, arguing that the Keohanes' lots 250 and 21 had merged for purposes of zoning, making lot 250 unbuildable. The Land Court judge allowed the plaintiffs' summary judgment motion, annulling the ZBA's decision and declaring lot 250 unbuildable, and the Keohanes appealed. We affirm.

Lot 250 is 12,000 square feet in area and located within a residential zoning district. In February of 1957, Falmouth amended its bylaw to increase the required lot size in residential zoning districts to 20,000 square feet, making lot 250 nonconforming. The parents took title to lots 250 and 21 in 1961. In the same year, the parents built a single-family dwelling on lot 21. In 1962, the parents built a tennis court along the southern boundary of lots 250 and 21, with the

majority of the tennis court located on lot 250. The tennis court remained on the property until 1996.[6]

The question of interpretation presented by this appeal is one of law. We afford deference to the ZBA's interpretation of its bylaw and its application to the facts. See Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 383 (2009). The ZBA's decision must be affirmed unless it was "based on a legally untenable ground, or [was] unreasonable, whimsical, capricious or arbitrary." Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass. App. Ct. 68, 72 (2003), quoting MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 639 (1970).[7]

The relevant sections of the Falmouth bylaw are § 240-66(C)(2) and § 240-66(C)(4), which offer more generous grandfather protection to nonconforming lots than G. L. c. 40A, § 6. Read together, these bylaw sections provide that a nonconforming lot held in common ownership with an adjoining lot

[6] The parents conveyed lot 21 to Sheila Canty in 1989. Harold Keohane acquired lot 250 from a trust controlled by the parents in 1993.

[7] The Keohanes' argument concerning the plaintiffs' standing to bring this suit is unavailing. As described by the Land Court judge, the plaintiffs as abutters have presumptive standing to challenge the ZBA decision. See 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 700-703 (2012). The Keohanes solely argue that the plaintiffs have not satisfied their burden to prove standing. This argument is not sufficient to rebut the presumption. See id. at 702-703.

on January 1, 1981, is buildable only if, on January 1, 1981, the nonconforming lot was vacant and there was a dwelling on the adjoining commonly held lot.[8] On January 1, 1981, lots 21 and 250 were held in common ownership, a dwelling existed on lot 21, and the tennis court existed on both lots.

The bylaw does not define the term "vacant." However, a tennis court is expressly included within the definition of a "structure" under the bylaw. Moreover, in its written decision, the ZBA stated that lot 250 became vacant when the tennis court was removed in 1996, thereby expressing its view that the lot was not vacant while the tennis court was situated on it. By accepting this interpretation of the word "vacant," the Land Court judge properly gave deference to the ZBA's reasonable interpretation of the bylaw it was charged to administer, and we

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[8] Section 240-66(C)(2) of the bylaw provides that:

> "Any lot not held in common ownership with any adjoining land as of 1 January 1981, not protected by Subsection C(1), shall be eligible to apply for a building permit if the lot has at least . . . [t]en thousand square feet of area in [a residential] District."

Section 240-66(C)(4) of the bylaw provides that:

> "Any lot held in common ownership with such adjoining lots, vacant as of 1 January 1981, may be treated as not held in common ownership if, as of 1 January 1981, a dwelling was in existence on all the other commonly held, contiguous lots, or if subsequent to 1 January 1981 the lot was no longer held in common ownership and a dwelling was permitted by special permit on each of such adjoining lots."

do the same.[9] See Glidden v. Zoning Bd. of Appeals of Nantucket, 77 Mass. App. Ct. 403, 406 (2010).

Under the bylaw, lot 250 is grandfathered, and buildable, only if it was vacant on January 1, 1981. However, as we have observed, the lot was not vacant while the tennis court remained on the lot from 1962 until 1996. Because lot 250 was not vacant on January 1, 1981, it does not receive the protection of § 240-66(C)(4), and it is not buildable under § 240-66(C)(2).[10]

Judgment affirmed.

By the Court (Green, C.J., Maldonado & Hand, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: August 6, 2019.

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[9] The ZBA was of the view that the removal of the tennis court in 1996, which made the lot vacant at that time, restored the lot to buildable status. However, under the clear language of the bylaw, to secure grandfather protection the lot must have been vacant as of January 1, 1981. Rourke v. Rothman, 448 Mass. 190 (2007), is not to the contrary and looked to the status of the lot (and applicable bylaw provision) as of a specified date and no other. Id. at 193 (construing effect of portion of G. L. c. 40A, § 6, which required lot seeking grandfather protection to conform to "then existing requirements" -- in that case, existing as of March 1970).

[10] We discern no merit in the Keohanes' contention that the plaintiffs are estopped from challenging the Keohanes' attempt to build on lot 250 because the siblings' father treated Patricia less favorably in his will on the understanding that she and her husband had been given two buildable lots. As the plaintiffs observe in their brief, the question is not the intent of the testator but the effect of the bylaw.

[11] The panelists are listed in order of seniority.